Scheid Electric *and* International Brotherhood of Electrical Workers, Local 343. Case 18–CA–19084

April 29, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

On November 13, 2009, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

We agree with the judge's finding that the Respondent constructively discharged Union Steward Tim Robertson by reducing his work hours because of his union activities. *Grocers Supply Co*., 294 NLRB 438, 439 (1989). We find it unnecessary to rely on the judge's alternative finding that the Respondent constructively discharged Robertson under the "Hobson's choice" theory of violation.

We also agree with the judge that the Respondent violated Section 8(a)(1) of the Act by interrogating Robertson about his union sympathies. In mid-April 2009, Robertson was summoned to a meeting with the Respondent's owner, Martin Walgenbach, in Walgenbach's office. Walgenbach asked Robertson whether he would remain employed if the Respondent went nonunion. Robertson answered that he could not afford to lose his pension and health insurance benefits, that he had always been and always would be a union member, and that he could not remain employed by the Respondent if it went nonunion. Walgenbach replied that he would hate to lose Robertson.

The judge correctly stated that the Board determines "whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center,* 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered in making such an analysis are the identity of the questioner, the place, and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB No. 132, slip op. at 2 (2009). Applying these factors, we find that Walgenbach's questioning was coercive.

The first two factors strongly indicate a coercive interrogation. It was carried out by the highest ranking official of the Respondent, Owner Walgenbach, and took place in his office. See *Matros Automated Electrical Construction Corp.*, 353 NLRB No. 61, slip op. at 3 (2008), enfd. 2010 WL 456755 (2d Cir. 2010). The background of the questioning and the nature of the information sought also exacerbated the coercive circumstances. At the time of Walgenbach's inquiry as to whether Robertson would remain with the Company if it went nonunion, the Respondent was obligated to recognize the Union based on existing collective-bargaining agreements. In this context, Walgenbach's question coercively conveyed the message that the Respondent was prepared to withdraw recognition from the Union, thereby pressuring Robertson to reveal whether he would support Walgenbach in this unlawful scheme. As the Board explained in *F.M.L. Supply, Inc.*, 258 NLRB 604, 616 (1981), such questions are coercive because they tend to "force the employees to abandon their sympathy for and allegiance to the Union. . . ." Accord: *Controlled Energy Systems*, 331 NLRB 251, 257 (2000); *East Belden Corp.*, 239 NLRB 776, 793 (1978), enfd. 634 F.2d 635 (9th Cir. 1980). And where, as here, Robertson was the union steward charged with representational duties, including administering the contracts that Walgenbach was planning to repudiate, the coercive impact of his question would reasonably be acute. Indeed, Robertson's status as an open union supporter (the final *Rossmore* factor) would reinforce, rather than ameliorate, the coercive effect of Walgenbach's question because it ef-

[1] In the absence of exceptions, we adopt the judge's finding that, at a union meeting on May 26, 2009, the Respondent's owner, Martin Walgenbach, unlawfully threatened employees that the Respondent was going nonunion, that there would no longer be a contract, and that none of the employees would have jobs.

[2] We have revised the judge's conclusions of law to reflect the judge's finding that the Respondent unlawfully failed to continue in effect the provisions of the parties' collective-bargaining agreements. We have revised the judge's proposed Order and notice to provide that the Respondent may neither fail to continue provisions of the collective-bargaining agreements nor implement changed provisions without the consent of the Union. We have further revised the judge's proposed Order and notice to conform more closely to his findings and to the amended conclusions of law as well as to the Board's customary remedial language.

fectively suggested to Robertson that the Union's status and his representational duties were in jeopardy.[3] Under these circumstances, the interrogation of Robertson violated Section 8(a)(1).[4]

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 5.

"5. Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit and repudiated the parties' existing collective-bargaining agreements. It further violated Section 8(a)(1) and (5) of the Act when it instituted new terms and conditions of employment, including wage rates and pension and health benefits, without obtaining the Union's consent. It also violated Section 8(a)(1) and (5) when it failed to continue in effect the provisions of the collective-bargaining agreements without obtaining the Union's consent."

ORDER

The National Labor Relations Board orders that the Respondent, Scheid Electric, Mankato, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities and sympathies.

(b) Threatening employees that it was going nonunion, that there would no longer be a contract, and that none of the employees would have jobs.

(c) Failing and refusing to bargain collectively and in good faith with the Union by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit and repudiating the parties' existing collective-bargaining agreements.

(d) Failing to continue in effect all the terms and conditions of the parties' existing collective-bargaining agreements, by changing wage rates and failing to make the contractually-required contributions to the fringe benefits funds found in article VI of the parties' collective-bargaining agreements, without the Union's consent.

(e) Implementing wage rates and other terms and conditions of employment inconsistent with the terms and conditions of the parties' existing collective-bargaining agreements without the Union's consent.

(f) Constructively discharging employee Tim Robertson because Robertson supported or assisted the Union and to discourage employees from engaging in those activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees.

(b) Rescind the unilaterally implemented wage rates and other terms and conditions of employment inconsistent with the terms and conditions of the parties' existing collective-bargaining agreements.

(c) Restore the terms and conditions of employment of the parties' existing agreements, and make the unit employees whole for any loss of earnings and other benefits attributable to the Respondent's unlawful conduct, with interest, in the manner set forth in the remedy section of the judge's decision.

(d) Continue in effect all the terms and conditions of the parties' existing agreements by making all the required benefit fund contributions to the Union's benefit funds found in article VI of the agreements that have not been made since June 1, 2009, in the manner set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this decision, offer Tim Robertson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Tim Robertson whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, with interest, in the manner set forth in the remedy section of the judge's decision.

(g) Within 14 days from the date of this decision, remove from its files all references to the unlawful termination of Tim Robertson, and within 3 days thereafter notify him in writing that this has been done and that the unlawful termination will not be used against him in any way.

(h) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel re-

[3] Contrary to the Respondent's representations in its exceptions, there is no evidence that the Union had lost majority support at the time of the interrogation. In any event, the Union enjoyed an irrebuttable presumption of majority support during the life of the collective-bargaining agreements. *Trailmobile Trailer, LLC*, 343 NLRB 95, 97 (2004).

[4] Because there are no exceptions to the judge's finding that Walgenbach unlawfully threatened employees with job loss at the union meeting on May 26, we find it unnecessary to address the judge's additional finding that Walgenbach threatened Robertson with job loss, as finding the additional violation would not affect the remedy.

cords and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Mankato, Minnesota, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2009.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2010

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees regarding the employees' union sympathy and activity.

WE WILL NOT threaten employees that we are going nonunion, that there will no longer be a contract, and that none of the employees will have jobs.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union by withdrawing recognition from the Union as the collective-bargaining representative of our employees or repudiate our existing collective-bargaining agreements with the Union.

WE WILL NOT fail to continue in effect all the terms and conditions of our existing collective-bargaining agreements, by changing wages rates and by failing to make the contractually-required contributions to the Union's fringe benefit funds, without the Union's consent.

WE WILL NOT implement wage rates and other terms and conditions of employment inconsistent with the terms and conditions of our existing collective-bargaining agreements without the Union's consent.

WE WILL NOT constructively discharge employees because they supported or assisted the Union and to discourage employees from engaging in those activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit and adhere to all provisions in our existing collective-bargaining agreements with the Union.

WE WILL rescind the unilaterally implemented wage rates and other terms and conditions of employment inconsistent with our existing collective-bargaining agreements.

WE WILL restore the terms and conditions of employment of our existing collective-bargaining agreements, and make the unit employees whole for any loss of earnings and other benefits attributable to our unlawful conduct, with interest.

WE WILL continue in effect all the terms and conditions of our existing collective-bargaining agreements by making all the required benefit fund contributions as set forth in article VI of our agreements.

WE WIL, within 14 days from the date of the Board's decision, offer Tim Robertson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tim Robertson whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

WE WILL, within 14 days from the date of the Board's decision, remove from our files all references to the unlawful termination of Tim Robertson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful termination will not be used against him in any way.

SCHEID ELECTRIC

Joseph H. Bornong, Esq., for the General Counsel.
Jon S. Olson, Esq., of Edina, Minnesota, for the Respondent-Employer.
Michael Priem, of Rochester, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on October 20, 2009,[1] in Minneapolis, Minnesota, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 18 of the National Labor Relations Board (the Board). The complaint, based upon an original and amended charge filed on various dates in 2009 by International Brotherhood of Electrical Workers, Local 343 (the Charging Party or the Union) alleges that Scheid Electric (the Respondent or the Employer) has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

[1] All dates are in 2009, unless otherwise indicated.

Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about his union activities and threatening him with loss of employment. It further alleges that the Respondent constructively discharged an employee because of the employees assistance and support of the Union in violation of Section 8(a)(1) and (3) of the Act. Lastly, the complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition of the Union as the exclusive collective-bargaining representative, repudiated the parties' collective-bargaining agreement, and instituted new terms and conditions of employment without notice or affording the Union an opportunity to bargain with respect to the conduct and effects of the conduct.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the oral argument of the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in residential and commercial electrical contracting and service, with its principal office and place of business located in Mankato, Minnesota. Respondent in conducting its business operations purchased and received goods and materials valued in excess of $50,000 at its Mankato, Minnesota facility directly from suppliers located outside the State of Minnesota. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

On or about April 12, 2006, Respondent entered into two "Letter of Assents-A" whereby it agreed to be bound by the collective-bargaining agreement between the Union and the Minneapolis Chapter of the National Electrical Contractors Association, Inc. (NECA), and to adhere to future agreements unless timely notice was given (GC Exhs. 2 and 3).[3] On or

[2] The Respondent did not appear at the hearing and presented no evidence in its defense. Prior to the hearing, the Respondent appeared by counsel and filed an answer. On October 16, counsel for the Respondent participated in two conference calls with the General Counsel and me. Prior to the commencement of the hearing on October 20, I requested the General Counsel to try and contact the Respondent's counsel as no one appeared at the hearing on behalf of the Employer. Counsel for the General Counsel was able to reach Respondent's attorney by telephone and reported that the attorney was not authorized to represent the Respondent in the proceeding and would not be appearing at the hearing. Accordingly, I proceeded to take the evidence of the General Counsel.

[3] The Respondent became a party to the Residential Wiring Agreement from September 1, 2008, to August 31 (GC Exh. 4), and the Residential Wiring Agreement from September 1, to August 31, 2010 (GC Exh. 5). Additionally, the Respondent became a party to the Inside

about July 23, 2007, a majority of the unit selected the Union as their representative for the purposes of collective bargaining with Respondent.[4]

At all material times, Martin Walgenbach has been the owner of Respondent and a supervisor within the meaning of Section 2(11) of the Act. Likewise, Allan Stork and Michael Priem have been business managers of the Union.

B. The 8(a)(1) Allegations

The General Counsel alleges in paragraphs 5(a) and (b) of the complaint that the Respondent in mid-April 2009 interrogated an employee regarding the employee's union sympathy and activity and threatened the same employee with loss of employment in retaliation for the employee's union activity and support. In late May 2009, the General Counsel asserts that the Respondent threatened employees that it might go nonunion and also threatened them with loss of employment if they continued to support the Union.

Facts

Employee Tim Robertson initially commenced employment with the Respondent as a "union salt" in early 2003, and left their employ in early 2006 when the Respondent refused to sign a union contract. After approximately a 7-month hiatus, he was rehired in late 2006, and remained continuously employed until he was separated on June 16 (GC Exh. 22). During his second period of employment, Robertson served as the union shop steward.

In mid-April 2009, Robertson was summoned to a meeting in Walgenbach's office. Walgenbach asked Robertson whether he would remain employed if the Respondent went nonunion. Robertson replied that he could not afford to lose his pension or health insurance benefits and has always been a union member. Robertson informed Walgenbach that he could not remain an employee of Respondent if it decided to go nonunion, that he was a union member and would always be a union member. Walgenbach told Robertson that he would hate to lose him.

Analysis

The Board has held that interrogation is not a per se violation of Section 8(a)(1) of the Act. *Rossmore House,* 269 NLRB 1176, (1984), affd. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In determining whether an interrogation is unlawful, the Board examines whether, under all the circumstances the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House,* 269 NLRB at 1177–1178. *Emery Worldwide,* 309 NLRB 185, 186 (1992). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House,* 269 NLRB at 1178 fn. 20; *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic,* 277 NLRB 1217, 1218 (1985).

Based on the unrebutted testimony of Robertson, who held the position of union steward and was interrogated in the owner's office, I find that the Act was violated. In this regard, Walgenbach interrogated Robertson about his union activities and threatened him with loss of employment because of his support for the Union.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 5(a) and (b) of the complaint.

Priem testified that union general membership meetings are normally held once a month, however, on May 26, the Union held a special meeting at the Teamsters hall in Mankato, Minnesota. Prior to the meeting that commenced around 5:30 p.m., both Priem and Robertson observed Walgenbach pull his truck into the parking lot. Priem apprised Walgenbach that this was a members' only meeting and he was not invited. Walgenbach replied that the meeting concerned his employees and he intended to be present. After the seven or eight employees and the business managers finished their refreshments, and just before the meeting commenced, Walgenbach came into the meeting room. In a very loud manner, he announced that the Union has never done anything for him and his shop was going to go nonunion. He further stated that we are no longer going to have a contract and none of you are going to have a job. He ended his remarks with profanity and stated that the employees could now go ahead with their meeting. Robertson, who attended the May 26 meeting, confirmed that Walgenbach uttered the above statements in his and other employees' presence.

Based on the unrebutted testimony of Priem and Robertson, I find in agreement with the General Counsel's allegation in paragraph 5(c) of the complaint that Section 8(a)(1) of the Act has been violated.

C. The 8(a)(1) and (3) Allegations

The General Counsel alleges in paragraphs 6(a) through (c) of the complaint that the Respondent on or about May 1, stopped assigning work to employee Robertson, and constructively discharged him on or about June 16, because of his assistance and support for the Union and to discourage employees from engaging in these activities.

Facts

Robertson testified that after his meeting with Walgenbach in mid-April 2009, his hours of work started to gradually decline. Prior to April 2009, Robertson was regularly assigned 40 hours of work each week. Additionally, Robertson had his

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Construction Agreement from June 27, 2008, to June 30, 2010 (GC Exh. 6).

[4] The "Voluntary Recognition" document states in pertinent part: This will confirm the fact that on July 23, 2007, at Scheid Electric you, Marty Walgenbach met with me and Mark Magult (witness) to discuss IBEW Local Union 343's request that you recognize it as the NLRA Sec. 9(a) collective-bargaining representative of all of your employees performing electrical construction work within the jurisdiction of the local union on all present and future jobsites, which we both agree is a unit appropriate for bargaining under Sec. 9(a) of the National Labor Relations Act. We presented to you authorization cards demonstrating that a majority of your employees have designated Local Union 343 to represent them for collective-bargaining purposes. You examined the cards and agreed that the local union has the support of a majority of the bargaining unit employees. Based on that showing of majority support, you have recognized the local union as the NLRA Sec. 9(a) collective-bargaining representative as described above (GC Exh. 8).

company truck and credit card removed. After mid-April 2009, Robertson started calling the Respondent two–three times each week looking for additional hours of work. His work assignments reached an all time weekly low of 6 hours after the May 26 union meeting. He then started calling the Employer three–four times per week looking for increased work. Robertson was told by employer representatives that he would receive a call back when work was available but he never received such a call.

Robertson became discouraged and went to the Respondent's office on June 16 to request a layoff slip. The Respondent provided him a separation notice indicating that he was let go due to a reduction in force (GC Exh. 22).

Discussion

In *Wright Line,* 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1993). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

Under the Act, a traditional constructive discharge occurs when an employee quits because his employer has deliberately made the working conditions unbearable and it is proven that (1) the burden imposed on the employee caused and was intended to cause a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities. *Grocers Supply Co.,* 294 NLRB 438, 439 (1989). Under the Hobson's choice theory, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp.,* 227 NLRB 612, 613 (1976).

Based on the unrebutted testimony of Robertson, who experienced unbearable working conditions that commenced after his mid-April 2009 meeting in Walgenbach's office and continued after the May 26 union meeting, I find that Robertson experienced such a reduction of his assigned work hours that he was forced to resign by seeking a layoff on June 16. Likewise, it is apparent, that Walgenbach retaliated against Robertson when he learned that Robertson intended to remain a loyal union member and would not resign his membership if the Employer went nonunion.

For all of the above reasons, I find either under the traditional constructive discharge line of cases or those under the Hobson's choice theory, Robertson's voluntary quit must be considered to be a constructive discharge. *Convergence Communications, Inc.* 339 NLRB 408, 412–413 (2003). Therefore, I find in agreement with the General Counsel that Respondent violated Section 8(a)(1) and (3) of the Act and sustain the allegations in paragraph 6 of the complaint.

D. The 8(a)(1) and (5) Allegations

The General Counsel alleges in paragraphs 8(c) and 10(a) of the complaint that on or about July 23, 2007, a majority of the unit designated the Union as their representative for the purposes of collective bargaining and since that date based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the unit. The Respondent denied both of these allegations in its answer.

The Board in *Staunton Fuel & Material, Inc.* 335 NLRB 717 (2001), addressed the issue of how a union whose status as a bargaining representative is governed by Section 8(f) can acquire through agreement with the employer the status of majority bargaining representative under Section 9(a) of the Act.

The Board held that a written agreement will establish a 9(a) relationship if its language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as a majority representative, and the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support. The Board noted that the approach taken by the Tenth Circuit in two cases, *NLRB v. Triple C Maintenance, Inc.,* 219 F.3d 1147 (10th Cir. 2000), and *Oklahoma Installation Co.,* 219 F.3d 1160 (10th Cir. 2000), establishes a legally sound and eminently practical set of standards for self-sufficient majority recognition. In both cases, the court confirmed that written contact language, standing alone could independently establish 9(a) bargaining status. To be sufficient, such language must unequivocally show (1) that the union requested recognition as the majority representative of the unit employees; (2) that the employer granted such recognition; and (3) that the employer's recognition was based on the union's showing of its majority support. As the Tenth Circuit discussed in *Triple C,* although it would not be necessary for a contract provision to refer explicitly to Section 9(a) in order to establish that the union has requested and been given 9(a) recognition, such a reference would indicate that the parties intended to establish a majority rather than an 8(f) relationship.

The evidence adduced at the hearing conclusively establishes that the Respondent voluntarily recognized the Union as a 9(a) representative under the Act (GC Exh. 8).

The General Counsel alleges in paragraphs 12(a) through (d) of the complaint that on or about June 2, the Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit and repudiated the parties' collective-bargaining agreement and on or about June 3, the Respondent instituted new terms and conditions of employment including wage rates, pension and health benefits without no-

tice to or affording the Union an opportunity to bargain with respect to this conduct and the effects of the conduct.

Facts

By letter dated June 2, the Employer withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit based on objective evidence it received from a majority of its employees (GC Exh. 9).

By letter dated June 2, the Union informed the Respondent that it is bound to the parties' contract under Section 9(a) of the Act until its expiration (GC Exh. 10).

By letter dated June 2, the Employer reaffirmed that it has withdrawn recognition of the Union based on evidence submitted by a majority of the bargaining unit and further indicated that it was privileged to repudiate the parties' collective-bargaining agreement based on Section 8(f) of the Act (GC Exh. 11).

Discussion

In *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001), the Board held that an employer must show a union's actual loss of majority support in order to lawfully withdraw recognition. That decision, however, was limited to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions. The Board went on to note that it continues to adhere to its well-established policy that employers may not withdraw recognition in a context of serious unremedied unfair labor practices tending to cause employees to become disaffected from the union nor can it rely on any expression of disaffection by its employees which is attributable to its undermining support for the union.

Applying those principles here, I find that the Respondent was not privileged to withdraw recognition in the subject case due to the unremedied unfair labor practices that I have found violative of the Act prior to the withdrawal of recognition and repudiation of the parties' collective-bargaining agreement.

Moreover, for additional reasons, the Board has held in *Precision Striping, Inc.,* 284 NLRB 1110 (1987), that regardless of whether the parties' collective-bargaining agreement may have been a 9(a) or 8(f) relationship, an employer is not free to unilaterally repudiate an existing agreement with an incumbent union. Here, although I found that the relationship between the parties is governed by Section 9(a) rather then Section 8(f) of the Act, the principle governs in either situation that the Respondent was not privileged to withdraw recognition or repudiate the parties' existing collective-bargaining agreements that were in full force and effect on June 2 and 3 (GC Exhs. 4 and 6).

Under those circumstances, in agreement with the General Counsel, Section 8(a)(1) and (5) of the Act has been violated as alleged in paragraph 12 of the complaint. Therefore, the implementation of new terms and conditions of employment including wage rates, pension, and health benefits among other things without notice to or bargaining with the Union with respect to this conduct or the effects of the conduct and without the Union's consent is violative of the Act. Accordingly, the Respondent must make employees whole for their unlawful actions.[5]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by interrogating an employee regarding the employee's union sympathy and activity, threatening employees with loss of employment and threatening employees that it might go nonunion.

4. Respondent violated Section 8(a)(1) and (3) of the Act when it stopped assigning work to employee Tim Robertson and constructively discharged him on June 16.

5. Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit and repudiated the parties' existing collective-bargaining agreement. It further violated Section 8(a)(1) and (5) of the Act when it instituted new terms and conditions of employment including wage rates and pension and health benefits among other things, without notice to or bargaining with the Union with respect to this conduct or the effects of the conduct and without the Union's consent.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(1) and (3) of the Act by constructively discharging Tim Robertson on June 16, 2009, I shall order the Respondent to offer Robertson full reinstatement to his former job or, if that job no longer exists to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Additionally, the Respondent shall make Robertson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge of Tim Robertson, and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

Further, having found that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to continue in effect all the terms and conditions of their existing collective-bargaining agreement by withdrawing recognition from the Union on June 2, 2009, and unilaterally implementing wage rates and other terms and conditions of employment on June 3, 2009, inconsis-

[5] Jennifer Buettner, the third-party administrator for benefits under the parties' existing collective-bargaining agreement (GC Exh. 6, art. VI), credibly testified that the last payment made by the Respondent to the fringe benefit funds occurred on June 12, reflective of payments through May 2009.

tent with the terms of the existing Agreement, I shall order the Respondent to recognize and bargain with the Union, rescind the unilateral changes, restore the status quo ante and make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* supra.

Finally, having found that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to continue in effect all the terms and conditions of their existing collective-bargaining agreement by failing, since June 1, 2009, to make the contractually required contributions to the Union's fringe benefit funds set forth in article VI of their Agreement, I shall order the Respondent to make all required benefit fund contributions since June 1, 2009, including any additional amounts applicable to such funds as set forth in *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from the Respondent's failure to make the required contributions to the funds, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service,* supra, with interest as prescribed in *New Horizons for the Retarded,* supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Scheid Electric, Mankato, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities and sympathies.

(b) Threatening employees with loss of employment because of their support and activities on behalf of the Union and threatening employees that it might go nonunion.

(c) Failing and refusing since June 2, 2009, to bargain collectively and in good faith with the Union by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit and repudiating the parties' existing collective-bargaining agreement.

(d) Failing to continue in effect all the terms and conditions of the parties' existing collective-bargaining agreement by failing since June 1, 2009, to make the contractually-required contributions to the fringe benefit funds found in article VI of the Agreement.

(e) Unilaterally implementing wage rates and other terms and conditions of employment inconsistent with the terms and conditions of the parties' existing collective-bargaining agreement without prior notice to and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

(f) Causing the termination of employee Tim Robertson by requiring him to either quit or agreeing to accept fewer work assignments because Robertson supported or assisted the Union and to discourage employees from engaging in those activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees.

(b) Rescind the unilaterally implemented wage rates and other terms and conditions of employment inconsistent with the terms and conditions of the parties' existing collective-bargaining agreement.

(c) Restore the status quo ante of the parties' existing agreement, and make the unit employees whole for any loss of earnings and other benefits attributable to this unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.

(d) Continue in effect all the terms and conditions of the parties' existing agreement by making all the required benefit fund contributions to the Union's benefit funds found in article VI of the agreement that have not been made since June 1, 2009, with interest in the manner set forth in the remedy section of this decision.

(e) Within 14 days from the date of this decision, offer Tim Robertson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Tim Robertson whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.

(g) Within 14 days from the date of this decision, remove from its files all references to the unlawful termination of Tim Robertson, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful termination will not be used against him in any way.

(h) Preserve and within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this decision.

(i) Within 14 days after service by the Region, post at its facility in Mankato, Minnesota, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2009.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 13, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees regarding the employee's union sympathy and activity.

WE WILL NOT threaten employees with loss of employment in retaliation for the employee's union activity and support.

WE WILL NOT threaten employees that we might go nonunion.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union by withdrawing recognition from the Union as the collective-bargaining representative of our employees or repudiate our existing collective-bargaining agreement with the Union.

WE WILL NOT fail to continue in effect all the terms and conditions of our existing collective-bargaining agreement by failing to make the contractually-required contributions to the Union's fringe benefit funds.

WE WILL NOT unilaterally implement wage rates and other terms and conditions of employment inconsistent with the terms and conditions of our existing collective-bargaining agreement, without prior notice to and without affording the Union an opportunity to bargain with respect to such conduct and the effects of such conduct.

WE WILL NOT cause the termination of employees by requiring them to either quit or agree to accept fewer work assignments because the employees supported or assisted the Union and to discourage employees from engaging in those activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective-bargaining representative of employees in the bargaining unit and will adhere to all provisions in our existing collective-bargaining agreement with the Union.

WE WILL make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of our unlawful action in repudiating our existing collective-bargaining agreement.

WE WILL recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL rescind the unilaterally implemented wage rates and other terms and conditions of employment inconsistent with our existing collective-bargaining agreement.

WE WILL restore the status quo ante of our existing collective-bargaining agreement, and make the unit employees whole for any loss of earning and other benefits attributable to this unlawful conduct, with interest.

WE WILL continue in effect all the terms and conditions of our existing collective-bargaining agreement by making all the required benefit fund contributions to the Union as set forth in article VI of our agreement.

WE WILL, within 14 days from the date of this decision, offer Tim Robertson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tim Robertson whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

WE WILL, within 14 days from the date of this decision, remove from our files all references to the unlawful termination of Tim Robertson, and WE WILL, within 3 days thereafter notify him in writing that this has been done and that the unlawful termination will not be used against him in any way.

SCHEID ELECTRIC